IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-627

THE AUSTIN NATIONAL BANK, Individually, and as Guardian of the Estate of ROBERT O. WALTERS, III, an Incompetent,

Petitioner,

v.

JOHN E. NORTON, et al,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The question presented is more accurately stated as whether the United States Court of Appeals for the Fifth Circuit manifestly erred in holding that, notwithstanding the provisions of § 233 of the Texas Probate Code, Respondents' Illinois contract with the guardian

for legal services and fees is enforceable in accordance with its terms, where Respondents fully and successfully performed the agreed services, and where the contract was approved in advance of performance by an order of the Texas probate court having jurisdiction of the estate and the time for review of that order has expired.

STATUTES INVOLVED

In addition to §§ 233 and 242 of the Texas Probate Code, cited by Petitioner, § 31 is also pertinent:

> Any person interested may, by a bill of review filed in the court in which the probate proceedings were had, have any decision, order, or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein; but no process or action under such decision, order or judgment shall be stayed except by writ of injunction, and no bill of review shall be filed after two years have elapsed from the date of such decision, order, or judgment. Persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to apply for a bill of review. Acts 1955, 54th Leg., p. 88, ch. 55.

STATEMENT OF FACTS

In addition to the facts stated by Petitioner, the following additional facts are pertinent.

Respondents Norton, an Illinois attorney, and Waite, a Tennessee attorney, entered into the contract for legal services which is the subject of this litigation in Norton's

office in Belleville, Illinois on March 10, 1970. By this contract, Norton and Waite promised to represent the estate in its claim for damages on behalf of the ward for the injury which rendered him incompetent. This contract was in a form and amount regularly and customarily executed in similar cases in Illinois. On March 25, 1970, the guardian petitioned the County Court of Bexar County, Texas (sitting as a probate court) for approval of the contract. An order authorizing the requested employment was entered by the court on that date.

The contract was fully performed by Respondents in Illinois (the state where the injury to the ward occurred). Norton, assisted by Waite and Kionka (an Illinois attorney and law professor who handles civil appeals and the legal aspects of trials as a consultant to other lawyers), prepared, filed, and tried the lawsuit in the Circuit Court of St. Clair County, Illinois. At the conclusion of the trial (in December, 1971), the jury returned a verdict in favor of the Petitioner as guardian in the amount of $1,325,000. An appeal was instituted by defendant, and during the course of that appeal (in December 1973), the case was settled (with the approval of the guardian) for $647,500. This sum, when added to $180,000 received prior to trial from two other defendants, made a total award of $827,500.

Following the settlement of the judgment, Respondents were advised for the first time by Petitioner of its position that § 233 of the Texas Probate Code prohibited Respondents from receiving the full amount of their contractual fee out of the $647,500 settlement. (The $180,000 settlement prior to trial is not involved in this dispute.) After formal demand and refusal, this lawsuit was instituted.

ARGUMENT

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), which merely gives the Court the power to award writs of certiorari to review judgments of the United States Courts of Appeals. However, Petitioner has wholly failed to show how this case falls within the provisions of Rule 19 of the Rules of this Court, which provides that a writ of certiorari will be granted *only* where there are "special and important reasons therefor." Among the reasons stated in the Rule as illustrative of those which would support the granting of a writ, the only one which could possibly have any application here is the case where:

> ". . . a court of appeals . . . has decided an important state . . . question in a way in conflict with applicable state . . . law; . . . ." Rule 19(1)(b).

There is no federal question involved, nor does Petitioner claim any procedural error below.

Petitioner's entire argument rests upon the premise that the order of the probate court approving the contract in question was *void*. The fact is, however, that Texas law is quite clear that the order in question, even assuming for the sake of argument that it is erroneous (which we deny), was *no more than* erroneous and *voidable* and no longer may be attacked in any manner.

In support of its argument that the decision of the Court of Appeals below is contrary to Texas law, Petitioner cites only two Texas cases. The most recent one, *In re Guardianship of Neal*, 406 S.W. 2d 496 (Tex. Civ. App. 1966), writ ref. n.r.e., 407 S.W.2d 770 (Tex. 1966), affirmed an order of the trial court holding that a

guardian had no power to make a gift of the ward's estate. No question was raised or decided as to the effect of such an order authorizing a gift had it been entered; and in any event, the power of a guardian to make a gift is so different from the power of a guardian to contract for legal representation that the *Neal* case can scarcely be said to be authority which is in conflict with the decision below.

The other case cited by Petitioner, *Glasgow v. McKinnon*, 79 Tex. 116, 14 S.W. 1050 (1890), involved the question whether the trial court erred in allowing into evidence in some unspecified proceeding proof concerning an order entered by the probate court authorizing the sale for partition of land which was part of the guardianship estate. The Texas Supreme Court held that the evidence should not have been admitted, because the probate court lacked jurisdiction to enter such an order; statutory authority for such a sale was totally absent, and therefore the matter was beyond the powers granted to the court. The court noted:

> "There is no ground for the presumption that some other legal cause for the sale was made known to the court, or that the sale was ordered upon such ground. Had the order stood alone, without any petition, presumptions might arise to sustain the jurisdiction of the court, but such presumptions cannot be indulged against proof which affirmatively appears in the record not impeached by the order itself." 14 S.W. at 1050.

In other words, if *any* ground could have been found, however erroneous, upon which such an order could have been based, then the jurisdiction of the court would have been presumed and the order would have been at most erroneous and voidable (on review by direct appeal) but not void. As we argued below, this is the clear import of well-established Texas law. *Pierson v.*

Smith, 292 S.W.2d 689 (Tex. Civ. App. 1956), writ ref. n.r.e.; *Heard v. Vineyard*, 212 S.W. 489 (Tex. Comm. App. 1919); *Parkins v. Martin*, 395 S.W.2d 862 (Tex. Civ. App. 1965), writ ref. n.r.e.; *Finley v. Hartsook*, 158 F.2d 618, 621-22 (5th Cir. 1946).

This is exactly the situation in the case at bar. As we argued below, there are at least two grounds upon which the probate court could have entered its order of March 25, 1970 approving the contract in question, despite the existence of § 233 of the Texas Probate Code. First, it could have determined that under applicable principles of conflict of laws, Illinois law applied to determine the validity of the contract. *Teas v. Kimball*, 257 F.2d 817 (5th Cir. 1958); *Cockburn v. O'Meara*, 141 F.2d 779 (5th Cir. 1944); 12 Tex. Jur. 2d Conflict of Laws, §§ 9, 12. Second, it could have determined that under the language of § 233, the purported limitation of contingent fees to one-third of the "property" recovered does not apply to unliquidated tort claims, and therefore the contract could be approved under the language of § 242 of the Texas Probate Code, which authorizes "all reasonable" attorney's fees without such limitation. *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 233 (5th Cir. 1972) (court will give effect to omission of term in one part of statute which was used in another part); *Hennessy v. Automobile Owners' Ins. Ass'n*, 282 S.W. 791 (Tex. Comm. App. 1926) (contract will not be rendered void by statute unless statute does so directly and expressly in unmistakable language). Both of these points were fully argued in the briefs below. We will not burden the Court with those arguments here, since we need only demonstrate that there is some colorable ground for the probate court's order in order to sustain that court's jurisdiction to enter it.

Even more importantly, Petitioner's argument completely ignores the recent case, *In re Guardianship of Hair*, 537 S.W.2d 82 (Tex. Civ. App. 1976), writ ref. n.r.e., which the Court of Appeals below found decisive. The *Hair* case is indistinguishable in its operative facts from the case at bar. There, as here, the probate court attempted to rescind its prior approval of a claim by attorneys for legal services rendered to the estate of a ward on the ground that the amount of the claim exceeded that authorized by § 233 of the Texas Probate Code. The Texas Court of Civil Appeals held that regardless of whether the attorneys' fee was authorized by § 233, the order approving the claim was a final and appealable order which could not be attacked following the expiration of the time authorized by statute for review of that order. A copy of the opinion in the *Hair* case is appended to this brief.

As the Court of Appeals below found, the *Hair* case is controlling. The identical statute and issue were involved. In both cases the time for review of the prior order had expired, and the court in *Hair* held that the order thereupon became final and could not be attacked or nullified. (In the instant case, the time for review expired on March 25, 1972. Texas Probate Code, § 31.)

Therefore, Petitioner's claim that the decision of the Court of Appeals below is contrary to existing Texas law is wholly without merit and, we suggest, even frivolous.

Moreover, in the Court of Appeals below, we argued five *additional* grounds, each of which standing alone would have been sufficient to support reversal and sustain the validity of our claim. These grounds may be summarized as follows:

1. *Conflict of Laws.* Texas conflict of laws rules require that Illinois law be applied in determining the validity and enforceability of the contract. Illinois law would sustain this contract.

2. *Estoppel.* Having accepted the benefits of the order of the probate court, as well as of the contract, the guardian is estopped to attack their validity, especially where even if the contract is enforced as written, the estate will receive over 86% of the amount of the jury's verdict for compensatory damages.

3. *Statutory Construction.* Properly construed, § 233 of the Texas Probate Code does not prohibit the contract in question, and therefore the probate court had the power to approve the contract under § 242.

4. *Individual Liability.* Regardless of whether the contractual fee could properly be paid out of the estate, the guardian is individually bound by the contract. Whether he can obtain reimbursement from the estate is a matter solely between the guardian and the probate court.

With reference to these arguments, the Court of Appeals below noted:

> "Appellants urge several issues as possible grounds for reversal, *each possibly sufficient standing alone to justify reversal.* The issues presented are that the retainer contract which provided for a contingent fee of 50% of the amount recovered was valid and binding on a Texas guardian, where that contract was valid in Illinois where it was entered into and performed; that the guardian was estopped from attacking the contract's validity since it accepted the benefits of the contract; that irrespective of the validity of the contract, the order of the probate court approving it was res judicata and thus not subject to collateral attack.

> "*While the reversal which we enter could perhaps be grounded on the conflicts of law point, or the estoppel point,* we do not pass on those questions. We rest our decision on the last issue raised." Opinion, p. 3; Petition, p. 8 (emphasis added).

Therefore, not only is the decision of the Court of Appeals in accord with Texas law on the ground upon which it rests; there were several *additional* grounds, all (we submit) equally valid and each "possibly sufficient standing alone to justify reversal." These arguments were also based on well-established principles of Texas law.

Finally, we believe it is obvious that this case is not of sufficient significance and national import to justify the valuable time and attention of this Court. Petitioner has wholly failed to demonstrate that there are "special and important reasons" for granting the writ. Petitioner suggests that the decision of the Court of Appeals below "casts doubt upon what has been the clear rule of statutory construction in Texas" (Petition, p. 4), and will unsettle the administration of estates in Texas. However, the opinion manifestly has no such effect. First of all, it was not based on any statutory construction, but rather on res judicata. In fact, the Court of Appeals expressly declined to decide the statutory construction issue which we had raised. Opinion, footnote 1, pp. 3-4, Petition, pp. 8-9. Thus, § 233 remains unaffected. Second, being based on res judicata, the decision has application solely to the case at bar and clearly has no pervasive effect as suggested by Petitioner. For this reason, and involving as it does an Illinois contract, the case is unique and cannot possibly have any general effect on the administration of Texas estates. Third, the case is clearly not disruptive of Texas law because it squarely follows

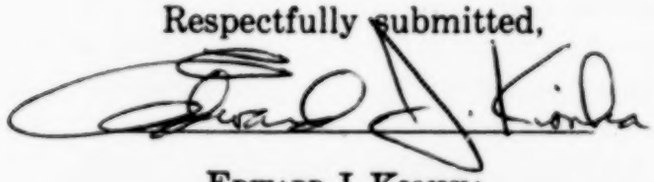
the *Hair* case, a Texas decision approved by the Texas Supreme Court.

The Petition For A Writ of Certiorari is wholly without merit.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition be denied; and Respondents further pray for relief under Rule 56(4) of the Rules of the United States Supreme Court. A motion seeking relief under Rule 56(4) will be filed in due course when Respondents' costs, expenses and fees can be determined.

Respectfully submitted,



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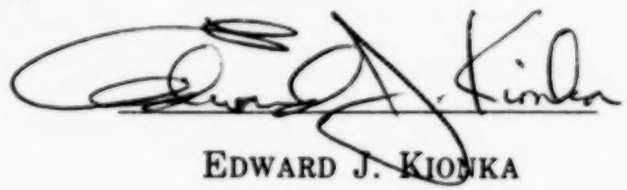
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Brief In Opposition to the Petition For A Writ of Certiorari To The United States Court Of Appeals for the Fifth Circuit have been served upon Petitioner and its counsel by depositing same, in a sealed envelope with first class postage prepaid, in the United States Post Office in Columbia, Illinois, addressed to Wm. Terry Bray, Graves, Dougherty, Hearon, Moody & Garwood, 2300 Austin National Bank Tower, Austin, Texas 78701, on November 23, 1977.



EDWARD J. KIONKA

APPENDIX

In re GUARDIANSHIP OF Jonell HAIR, N.C.M.

No. 7759.

Court of Civil Appeals of Texas, Beaumont.

April 1, 1976.

Rehearing Denied May 13, 1976.

The County Probate Court, Liberty County, Harlan D. Friend, J., refused to approve a final account of guardian, and an appeal was taken. The Court of Civil Appeals, Keith, J., held that even if an order approving a claim against an estate under guardianship was erroneous, it could not be collaterally impeached, and a new county judge could not properly refuse to approve the final account of a guardian because of payment of such already approved claim.

Order insofar as purporting or attempting to modify claim vacated and set aside.

1. Guardian and Ward ⇐67

Where claimants followed implicitly provisions of statute in procuring approval and payment of their claim from estate of ward, approval of claim by county judge had force and effect of final judgment, and could be reviewed only by appeal. V.A.T.S. Probate Code, §§ 233, 312(d, e); Rules of Civil Procedure, rule 329b.

2. Guardian and Ward ⇐67, 155

Even if order approving claim against estate under guardianship, for attorney fees, was erroneous, it could not be collaterally impeached, and new county judge could not properly refuse to approve final account of guardian because of payment of such already approved claim. V.A.T.S. Probate Code, §§ 233, 312(d, e); Rules of Civil Procedure, rule 329b.

Richard R. Morrison, III, Liberty, for appellant.

C. Bruce Stratton, Liberty, for appellee.

KEITH, Justice.

Intervenors appeal from an unfavorable order entered by the constitutional county court of Liberty County sitting in probate. Our appellants, a firm of lawyers, performed many and divers services for the ward and her estate, including the successful disposition of a murder case. After the conclusion of their services, their claim was submitted by the guardian of the person and estate to and was duly approved by the county judge by an order dated July 1, 1974. After the allowance and approval of the claim by the court, the guardian paid the attorneys the amount allowed by the court: $37,943.93 for their services. No appeal was taken from the order approving the payment of this claim.

Thereafter, the guardian filed her final account wherein she showed, *inter alia*, the payment to the attorneys as noted above. The new county judge refused to approve the final account unless there was a substantial reduction in the amount of such fees, suggesting that the intervenors should remit the sum of $30,443.73 into the registry of the court.

Intervenors, challenging the jurisdiction of the county judge to enter such an order of remittitur, declined to make the suggested payment and appealed from the order requiring such payment. There has been no challenge of our jurisdiction and we proceed to a determination of the questions presented by the briefs of the parties.

[1] Intervenors followed implicitly the provisions of Tex.Prob.Code Ann. § 312(d) in procuring the approval and payment of their claim; thus, the approval of the claim by the county judge had the "force and effect of [a] final judgments." Probate Code § 312(d). The allowance of the claim could be reviewed only by appeal. *De Cordova v. Rogers*, 97 Tex. 60, 75 S.W. 16, 19 (1903). Tex.Prob.Code Ann. § 312(c) provides an exclusive remedy in this type of claim. 18 M. Woodward & E. Smith Texas Practice, Probate and Decedents' Estates, § 928, p. 265 (1971). See also, *Jones v. Wynne*, 133 Tex. 436, 129 S.W.2d 279, 283 (1939).

The constitutional county court having approved intervenor's claim on July 1, 1974, its judgment became final thirty days thereafter. Tex.R.Civ.P. 329b. And, as stated in the text cited earlier (18 Texas Practice § 927), "It [the order approving the claim] is immune to collateral attack on evidence outside the record and is governed by the usual presumptions in favor of the validity of judgments of the probate court."

[2] But appellee contends that the order approving the claim was void since it was "in direct violation of V.A.T.S. Probate Code, § 233," pointing to the fact that the contingent fee contract mentioned in the claim referred to a fifty percent contingent fee while the code reference limits the contingent fee to one-third. We disagree for the reasons now to be stated.

Even if we concede, which we do not, that the order approving the claim was erroneous, it was, nevertheless, a judgment of a court of competent jurisdiction and is safe from a collateral attack. *Lynch v. Baxter*, 4 Tex. 431, 449 (1849). It being an order of the court made in the progress of a rightful administration, touching matters concerning which the court had the right to deliberate and decide, it may not be collaterally impeached because "however erroneous [it] may be, [it is] not void." *Withers v. Patterson*, 27 Tex. 491, 497 (1864).

The order of the probate judge of Liberty County entered in Cause No. 4151 upon the docket of said court on April 2, 1975, insofar as it purports or attempts to modify the claim of attorney's fees approved on July 1, 1974, is here and now vacated, set aside, and henceforth the same shall stand for naught.

It is SO ORDERED.